ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Deployment of Wireline Services	)	CC Docket No. 98-147
Offering Advanced Telecommunications	)	
Capability	)	

REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The comments filed in this docket overwhelmingly show that the adoption of a separate affiliate approach for advanced services would be a tragic roadblock erected on the road to local competition. Indeed, ILECs, regulatory agencies and CLECs alike have cast their vote against the adoption of these separate affiliate rules, albeit for varying reasons. Instead of attempting to implement a complex and contentious data affiliate scheme, the Commission should devote its efforts in this area to the clarification and enforcement of Section 251(c). In addition, the Commission should adopt a broad natural reading of the term "successor or assign" in order to maximize CLEC entry into the advanced services sector through Section 251(c).

Pursuant to the statutory authority granted to it in Section 251(c)(6), and upheld by the Eighth Circuit, the Commission should adopt national collocation rules. CompTel urges the Commission to move beyond the decade old "caged" model of collocation by requiring ILECs to offer cageless collocation. *Uncaging Competition*, CompTel's White Paper provided in its initial comments, provides the Commission with a blueprint for reforming collocation to meet the needs of the new generation of competitors seeking to offer advanced data services. The competitive industry is unanimous in endorsing CompTel's recommended cageless collocation options. Not only is cageless collocation feasible, but any alleged security concerns can be addressed easily and with minimal effort. Specifically, commenters agree with CompTel that security can be maintained through the proper labeling of equipment, "keyed" access, video surveillance and locking cabinets. Further, the Commission should eliminate all restrictions on the type of equipment that may be collocated because it would be futile to attempt to identify all permissible equipment given the rapid pace of technological change. CLECs must be able to collocate all equipment that will enable them to compete effectively with the ILECs.

In order to ensure that CLECs have access to unbundled loops suitable for data purposes, the Commission should also define two new network elements specifically intended for packet-switched traffic; namely, a "shared data transport" network element and a "shared data channel" network element, together with their sub-element functionalities. The shared data transport element would provide packetized transport between the CLEC's data network and a designated point on the ILEC's network interfacing with a packet device. The shared data channel element would provide a channel from the CLEC's point of interface to a designated customer location.

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following reply comments on several issues raised in the comments filed in response to the Notice of Proposed Rulemaking portion of the Commission's *Memorandum Opinion and Order, and Notice of Proposed Rulemaking* issued on August 7, 1998.[1]

I. INTRODUCTION

The comments filed in this docket reflect a general consensus that the Commission should not give up on the 1996 Act, in particular Section 251(c) of the Act. Rather, the record demonstrates that the Commission should exercise the authority given to it by Congress to adopt additional national collocation requirements and UNE unbundling rules that reflect the best of the pro-competitive initiatives adopted by state commissions thus far.

First, there is more the Commission can do to fulfill Section 251(c)'s mandate that features and capabilities of the network be made available on an unbundled basis. In the

advanced services context, it is critical that the Commission define network elements on a functional basis so as not to discourage innovation in advanced services. As CompTel recommended in its initial comments, the Commission can promote the deployment of advanced technologies by defining two new network elements useful for the transport of packet-switched traffic to a CLEC's network interconnection points. Specifically, CompTel urges the Commission to define a "shared data transport" UNE comprised of transport between a CLEC's network and any other point in the ILECs' network that interfaces with a packet device and to define a "shared data channel" UNE providing packet functionality between the CLEC's data network interface and a customer location.

Second, CompTel's White Paper, *Uncaging Competition*, provides the Commission with a blueprint for reforming a collocation model adopted over 10 years ago. The ILECs' unnecessary insistence on physical separation between carriers' spaces (*i.e.,* collocation "cages") is increasing the cost and complexity of collocation and delaying competition in all markets, including advanced services. Now is the time for the Commission to follow the model of competitive environments, where equipment is collocated side-by-side, with common sense labeling and security measures used to protect carriers' networks.

At the same time, however, the Commission should heed the warnings of many of the commenting parties and dispense with the separate advanced services affiliate approach. The separate affiliate approach will not promote competition in advanced services, even if the separate standards are strengthened as most competitive carriers recommend. In order to truly

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In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al., CC Docket Nos. 98-147 et al., FCC 98-188 (rel. (continued...)

expedite local competition and the deployment of advanced services, the Commission should rely on Section 251, and the Commission's rules (as revised) adopted pursuant to that authority.

II. THE COMMISSION SHOULD DEFINE ADDITIONAL UNES SPECIFICALLY INTENDED FOR DATA TRANSPORT

In its initial comments, CompTel agreed with the Commission that it is important to ensure that CLECs have access to unbundled loops suitable for data purposes. CompTel stressed that it is equally important, however, that the Commission also establish UNEs enabling a carrier to route data traffic from its own (or the ILEC's) DSLAM to its selected network interconnection points. A DSL loop is ineffective if the carrier does not have the ability to carry data traffic from the point of packet switching to its own data network.

In order to provide this ability, CompTel recommended that the Commission define two new network elements specifically intended for packet-switched traffic.[2] First, the Commission should define a "shared data transport" network element. This element would provide packetized transport (at a capacity of the CLEC's choosing) between the CLEC's data network and a designated point on the ILEC's network interfacing with a packet device. By way of example, this network element would provide packetized transport from the back-end of a DSLAM to the point of interconnection to a CLEC's own data network. In this manner, a CLEC could utilize the capabilities of ILEC packet networks to expand the reach of its own data services.

Second, the Commission also should define a "shared data channel" as a network

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(...continued)
August 7, 1998)(hereinafter *NPRM*). Comments were filed on September 25, 1998.

element. This element would provide a channel from the CLEC's point of interface to a designated customer location. It would provide the same functionality described above, plus data transport provided by an xDSL loop and DSLAM.

CompTel notes that its proposed UNEs would include the functionalities described by ALTS in its consultant's study.[3] The end to end functionality ALTS describes is embodied in CompTel's proposed "shared data channel" UNE.[4] In addition, CompTel supports providing the sub-element functionalities described by ALTS as additional UNEs available for entrants that do not need all of the functionality provided by "shared data transport" or "shared data channels."[5] Providing the CLEC with the ability to obtain data UNEs at different levels of functionality will provide CLECs with the flexibility necessary to serve diverse geographic regions, regardless of the extent of the CLEC's own data network in the area.

III. CAGELESS COLLOCATION IS FEASIBLE AND DESIRABLE FOR ALL TYPES OF EQUIPMENT

The second area where the Commission can further Section 251(c)'s goals is by reforming ILEC collocation practices. CompTel urges the Commission to move beyond the decade old "caged" model of collocation by requiring ILECs to offer cageless collocation. CompTel's White Paper entitled *Uncaging Competition* sets out in detail the urgent need to adopt this "next generation" of collocation rules and the significant benefits associated with

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2 CompTel Comments at 45.

3 ALTS Comments at 57, HAI Study at 75-80 (attached to ALTS Comments).

4 *See* HAI Study at 75-80.

5 *Id.* at 81-85.

cageless collocation.[6] The traditional collocation arrangements offered by ILECs are complex, costly and slow to provision. Moreover, these methods are particularly ill-suited to the needs of the new generation of competitive entrants seeking to offer advanced data services to the broad market of customers.

In the White Paper, CompTel explains that the central assumption of traditional collocation arrangements – that physical collocation space should be caged – has no validity in today's marketplace (if it ever did have any validity). In fact, it leads to most of the collocation problems that the *NPRM* discusses, including the significant delays in provisioning collocation, its exorbitant costs, and the limited availability of collocation space at critical ILEC premises. To alleviate these problems, the White Paper recommends that regulators require two basic forms of cageless collocation be made available to competitors, with the only difference being whether a CLEC's equipment is located in bays or racks adjacent to an ILEC's equipment or in separate collocation space used for this purpose. The competitive industry is unanimous in endorsing CompTel's recommended cageless options.

A. Cageless Collocation is Feasible

In the *NPRM*, the Commission recognized that requiring alternative collocation arrangements, such as cageless collocation, would facilitate competitive entry into the market and optimize the space available at the ILECs' premises.[7] Cageless collocation is feasible in two basic forms: "shared space collocation" and "common space collocation." Specifically, these

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6 *See* CompTel White Paper No. 2, *Uncaging Competition; Reforming Collocation for the 21st Century,* written by Robert Falcone and Joseph Gillan (September 1998)("*Uncaging Competition*"), attached as Exhibit B to CompTel's Comments.

7 *NPRM* at ¶ 138.

two options are defined as follows: (1) shared space collocation, in which a "shared area" on the ILEC's premises is dedicated to collocation of the equipment of any CLEC in a cageless environment, but which is physically separated from the ILEC equipment; and (2) common space collocation, where equipment is located side-by-side in the same environment as the ILEC's equipment, with only the minimal degree of separation necessary to clearly identify each carrier's equipment.[8]

These forms of cageless collocation not only are feasible, but are in use today. As explained in the White Paper, cageless collocation is the preferred option in competitive collocation markets. For example, cageless collocation is the norm for interconnection among long distance providers, Internet service providers, and in collocation offered by CLECs at their premises.[9] The record confirms that cageless collocation is feasible for the ILECs also. U S West reports that it already offers cageless collocation to competitors.[10] GTE supports cageless collocation (so long as it does not include common space collocation), and Ameritech and Bell Atlantic take similar positions.[11] Thus, there is no reason why the cageless option cannot be expanded to include all ILECs and all states.

The only objection ILECs raise to cageless collocation – and common space collocation in particular – are alleged security concerns.[12] However, in a cageless collocation environment, these concerns can be addressed easily and with minimal effort. In shared space cageless

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8 *See Uncaging Competition* at 27-29.

9 *Id.* at 19-26.

10 U S West Comments at 40.

11 GTE Comments at 66-73; Bell Atlantic Comments at 32; Ameritech Comments at 42.

12 *See, e.g.,* Bell Atlantic Comments at 32, 34; GTE Comments at 68; U S West Comments at 40.

collocation, equipment is physically separated from that of the ILEC, and the CLEC's authorized employees would have full access to the shared area for purposes of installation, maintenance and repair. In common space collocation, the equipment is separated only to the extent required to identify the CLEC's equipment, thereby making the most efficient use of the limited space. Importantly, as noted in the White Paper, the ILEC's central office space is already controlled; that is, the goal here is not to create from scratch a secured environment, but rather to share an already existing secured environment.[13] Commenters agree with CompTel that security can be maintained through the proper labeling of equipment, "keyed" access, video surveillance and locking cabinets.[14]

It is also important to recognize that, as competition expands into suburban and rural markets with smaller central offices, the need for more efficient and less costly collocation options will be even greater. CompTel agrees with AT&T that the problems associated with caged collocation become even more acute in smaller central offices.[15] In these locations, even "shared space collocation" may be problematic due to space concerns. Accordingly, it is critically important that "common space collocation" be made available in such situations.[16]

Simply put, if the Commission wants to accommodate new types of equipment, conserve space and speed the deployment of advanced services, it should require ILECs to offer cageless

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13 *Uncaging Competition* at 31.

14 *Id.* at 31-33; *see* AT&T Comments at 86-87; ALTS Comments at 48-52; Covad Comments at 28; e.spire Comments at 20.

15 AT&T Comments at 81.

16 In addition, as a way to improve traditional caged collocation, CompTel suggests that CLECs should be able to purchase caged space in more flexible increments, such as 25 square feet minimum with additional space available in 10 square foot increments. *See Uncaging Competition*, 36. SBC, for example, is willing to agree to a less than 100 square foot space. SBC Comments at 21-22.

collocation. Security can continue to be provided through various measures already in use today. As shown in *Uncaging Competition*, cageless collocation utilizes the best features of traditional caged methods, and yet it is less costly and more efficient.[17]

B. All Equipment Should be Permitted to be Collocated

The Commission noted in the *NPRM* that the current trend in manufacturing is to integrate multiple functions in telecommunications equipment, allowing service providers to benefit consumers through lower costs and an increase in service offerings.[18] Because of this trend, certain facilities required for collocation to provide advanced services also perform switching functions. In order to provide advanced services, then, competing carriers have a need to collocate at ILEC premises even if the equipment possesses additional capabilities, such as switching. For this reason, all multi-purpose equipment, regardless of whether it also performs switching functions, should be permitted to be collocated. In other words, CLECs should be able to collocate any type of equipment that will enable them to compete effectively with the ILEC. Indeed, restrictions that limit equipment type and use allow the ILEC to restrict the pace of the deployment of new technology.

CompTel recommends eliminating all restrictions on the type of equipment that may be collocated because any attempt to identify permissible equipment cannot keep pace with the rapid technological change in the industry.[19] Attempts to identify permissible types of equipment will result in needless delay in the deployment of advanced services, the stifling of

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17 *Uncaging Competition* at 30.

18 *NPRM* at ¶ 128.

19 *Id.* at ¶ 134.

innovation, and conflict about the technical nature of new equipment. In fact, the BOCs themselves recognize the difficulties of maintaining comprehensive information on telecommunications equipment. U S West states that compiling a list of approved equipment "would need constant updating in light of the pace of technological change."[20] Bell Atlantic claims that "creating and updating such a list would be nearly impossible. Many items of 'approved' equipment are available with a large number of varying and constantly-changing capabilities and options."[21] Thus, CompTel recommends that the Commission prohibit all restrictions on the type of equipment that may be collocated in its adoption of national collocation rules.

IV. THE COMMISSION HAS JURISDICTION TO ISSUE COLLOCATION RULES

Previously, in the *Local Competition Order*, the Commission adopted several rules implementing the collocation requirements of Section 251(c)(6),[22] and these rules were upheld by the Eighth Circuit in *Iowa Utilities Board.*[23] Some ILECs, however, question the FCC's jurisdiction to revise its own national rules. There is no merit to such claims, however.

A. The Eighth Circuit Unambiguously Upheld the Commission's Authority to Adopt Collocation Rules

Most ILECs concede that the FCC has jurisdiction to adopt collocation rules, and confine their comments to half-hearted arguments that the FCC should not exercise that authority.

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20 U S West Comments at 39-40.

21 Bell Atlantic Comments at 41.

22 47 C.F.R. §§ 51.321, 51.323; *see also Local Competition Order*, 11 FCC Rcd at 15782-15811, ¶¶ 555-617.

Ameritech, alone among the ILECs, claims that the Commission lacks authority "to issue collocation rules, unless the Commission finds that xDSL is an interstate offering."[24] In making this argument, Ameritech posits that the Commission's reliance on *Iowa Utilities Board* is misplaced in that Congress did not expressly call for the Commission's involvement in issuing collocation rules pursuant to Section 251(c)(6).[25]

This argument ignores the express language of *Iowa Utilities Board.* The Court found "that the Commission's rules and policies regarding the incumbent LECs' duty to provide for physical collocation of equipment [are] consistent with the Act's terms contained in subsection 251(c)(6)."[26] The Court could not have been more clear. The FCC's collocation rules were upheld in their entirety as "consistent" with Section 251(c)(6). The rules could not be consistent with the Act, however, if Section 251(c)(6) did not give the Commission authority to issue national rules in the first place. Thus, Ameritech's argument is directly contrary to the Eighth Circuit's finding on this point.

In any event, Section 251(c)(6)'s terms clearly call for the FCC's involvement in collocation rules. The statute requires ILECs "to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier

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23 *Iowa Utilities Board v. FCC*, 120 F.3d 753, 818 (8th Cir. 1997)("*Iowa Utilities Board*"), *cert. granted sub nom, AT&T Corp. v. Iowa Utils. Bd.,* 118 S.Ct. 879 (1998).

24 Ameritech Comments at 36-37.

25 *Id.*

26 *Iowa Utilities Board* at 818.

demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."[27] This section gives the Commission express authority to adopt collocation rules. Notably, with respect to collocation in (c)(6), the role of the states is limited to the narrow question of whether physical collocation is not practical or there is insufficient space. The remainder of this section is to be implemented by the Commission.

B. The Issuance of National Collocation Rules Does Not Implicate the Takings Clause of the Fifth Amendment

Citing *Bell Atlantic v. FCC*, U S West contends that a requirement to collocate switching equipment would constitute a taking under the Fifth Amendment.[28] However, the "question of statutory authority to impose (physical or virtual) collocation obligations on incumbent LECs largely evaporates in the context of the 1996 Act."[29] Indeed, with the express authority to order physical and virtual collocation pursuant to Section 251, the Commission found that "any remaining takings-related issue necessarily is limited to the question of just compensation."[30] Thus, the Commission clearly has the statutory authority to adopt national collocation rules.

The Commission has previously concluded (correctly) that it has broad discretion in interpreting the scope of Section 251(c)(6).[31] CompTel agrees that the Commission has broad authority with respect to the issuance of rules to govern the collocation of equipment. Any other

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27 47 C.F.R. § 251(c)(6).

28 U S West Comments at 36, citing *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994.) ("*Bell Atlantic v. FCC*"). *See also* GTE Comments at 62-64; Bell Atlantic Comments at 37-38.

29 *Local Competition Order* at ¶ 616.

30 *Id.* at ¶ 617.

31 *Id.* at ¶ 579.

interpretation would seriously undermine the competitive purposes of the 1996 Act and impede local competition.

V. THE NPRM'S SEPARATE AFFILIATE PROPOSAL IS A BAD IDEA AND SHOULD BE ABANDONED

In addition to reforming its rules pursuant to Section 251, the Commission's other major proposal in the *NPRM* was consideration of an "alternative" path by which an ILEC could offer advanced services on a largely deregulated basis, if those services were offered through a separate affiliate meeting certain conditions. Although commenters come to the conclusion for different reasons, the record overwhelmingly confirms that this separate affiliate proposal is a bad idea. The *NPRM*'s proposal received virtually no support from any commenter, and most agreed that both the theory and proposed implementation of a separate affiliate approach are seriously flawed.

A. The Comments Refute the Notion that a Separate Affiliate will Promote the Widespread Deployment of Advanced Services

Virtually no commenter – CLEC, ILEC or regulatory commission – supports the proposition that an ILEC advanced services affiliate will promote competition. Competitive carriers agree with CompTel that exempting ILEC equipment and services from Section 251(c) will hinder, rather than promote, the widespread deployment of advanced services.[32] As Sprint, TRA and others noted, the primary effect of a separate affiliate approach would be to foreclose

[32] *See, e.g.,* MCI WorldCom Comments at 22-24, 27.

entry by carriers planning services that require anything more than a conditioned loop.[33] If new network capabilities are shifted to the affiliate (whether through transfers or new deployment), the only elements available to competitors would be an aging POTS network based on increasingly obsolete technology. None of the features or functionalities of advanced services equipment would be available for use by smaller competitors. In addition, access to the ubiquity of the ILECs' networks is critical to the deployment of advanced services to the mass market, just as it is to the deployment of traditional voice services. CompTel agrees with Qwest that the Commission offers no explanation why the economics underlying Section 251(c)'s requirements as applied to the circuit-switched local exchange network would not also apply to the evolution of that network to a broadband packet-switched network.[34] The intent of Section 251(c) is to require the ILECs' economies of scale that govern the local network to be shared with competitors. Thus, particularly for smaller carriers, access to ILEC advanced service features and functionalities may offer the only feasible near-term strategy for deploying advanced services across an existing customer base.[35]

CLEC concerns with the separate affiliate approach are not limited to the fact that it is a step backward in competitive alternatives. In addition, competitive carriers noted that the proposal would not succeed in establishing a "truly separate" entity that is at parity with competitors. Competitive carriers agree with CompTel that the Commission must take seriously the concept that an affiliate should be "truly separate" and operate just like a CLEC, and therefore adopt much more stringent separation standards. Thus, there is substantial support in

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33 Sprint Comments at 7; TRA Comments at 9-11.

34 Qwest Comments at 10.

the record for additional separation standards, including (1) substantial independent ownership of any affiliate,[36] (2) a prohibition on joint marketing,[37] (3) complete separation between ILEC and affiliate, including no common ownership of any equipment, property or facilities and no sharing of CPNI,[38] and (4) a prohibition on the affiliate's use of total service resale obtained from the ILEC.[39] No separate affiliate approach can begin to achieve its goals without these additional requirements.

Many state commissions and the Bureau of Economics of the Federal Trade Commission ("FTC") echo competitive carriers' concerns. The FTC, for example, cautions that weak separation rules may thwart the development of competitive markets in advanced services.[40] Others are more direct, warning that the separate affiliate approach is fraught with problems, as network capabilities such as SS7 or the next generation signaling capability may be shifted from the public network to the affiliate.[41] The Indiana and Wisconsin Commissions expressed concern that an ILEC and its affiliate may collaborate in schemes to stifle competition, as Ameritech attempted with its provisioning of frame relay services.[42] In order to address these

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35 *See, e.g.*, GST Telecom Comments at 11-12; Westel Comments at 3.

36 *See, e.g.*, AT&T Comments at 20; e.spire Comments at 11-12; ICG Comments at 8.

37 *See, e.g.*, e.spire Comments at 9-10; ICG Comments at 15; MCI WorldCom Comments at 32.

38 *See, e.g.*, Cable & Wireless Comments at 5-6; e.spire Comments at 9-10, 14-15.

39 *See, e.g.*, AT&T Comments at 28; e.spire Comments at 18; ICG Comments at 14-15.

40 Staff of the Bureau of Economics of the Federal Trade Commission Comments at 3.

41 Florida PSC Comments at 3; New York DPS Comments at 6; Indiana Utility Regulatory Commission/Staff of the Public Service Commission of Wisconsin Comments at 11 ("Indiana/Wisconsin Comments").

42 Indiana/Wisconsin Comments at 6; *see* Minnesota DPS Comments at 7 (discussing U S West preferential treatment of an affiliate).

and other problems, the states generally support more rigorous rules and recommend that state commissions also be permitted the flexibility to address other separation issues by adopting additional state-specific requirements.[43]

The ILECs, for their part, also disapprove of a separate affiliate approach, albeit with a different purpose in mind. They argue that separate affiliates are costly and duplicative, and involve extensive oversight by the Commission.[44] An affiliate approach, they argue, would divert resources that might otherwise be spent deploying advanced service capabilities if it were to deploy such facilities through the ILEC. While CompTel is skeptical of such claims at a time when ILECs already are aggressively deploying xDSL services under the regulatory rules they claim stifle ILEC deployment, CompTel notes that all providers will benefit if advanced services are deployed through the ILEC itself, rather than through an affiliate. To the extent that the separate affiliate proposal succeeds in diverting resources to an affiliate, consumers and competition suffer.

B. Implementation of Section 251(c) Will Best Promote the Widespread Deployment of Advanced Services

The universal disapproval of the idea should prompt the Commission to abandon the separate affiliate approach. The ILECs claim that they are not interested in using a separate affiliate unless the rules are so watered down as to be meaningless. Other regulatory agencies, on the other hand, join the CLECs in arguing that weak rules are worse than no rules at all. In this environment, one thing is clear: the adoption and enforcement of separate affiliate rules will

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43 Illinois Commerce Commission Comments at 3; Minnesota DPS Comments at 5; *see* Indiana/Wisconsin Comments at 5 (calling for State/Federal cooperation).

44 Bell Atlantic Comments at 18-19; BellSouth Comments at 15-16; GTE Comments at 29.

be a contentious, complex, and time-consuming process. Trapped between competing claims of "too little" protection and "too much" regulation, with no business purpose for the entity to be created, the Commission will find it extremely difficult to craft a detailed set of rules addressing all of the structural and operational issues to provide a "just right" mix of independent operation and access to ILEC resources. Further complicating the task is the pace and nature of technological change underlying advanced services. Given these difficulties – and the fact that no industry segment wishes to see these rules adopted—there seems little likelihood that the Commission could successfully develop a program that ILECs will use *and* that will promote the competitive provision of advanced services.

In evaluating the wisdom of a separate affiliate approach, the Commission should be cognizant of the impact its proposal may have on its ability to carry out its other weighty responsibilities under the Communications Act. A separate affiliate approach requires a complex regulatory scheme that cannot work unless it is rigorously monitored and enforced.[45] At the present time, the Commission is faced with scores of other difficult and complex tasks, not the least of which are driving access charges to cost, reforming universal service support mechanisms, reviewing telecommunication industry mergers, and reviewing BOC Section 271 applications on an expedited basis. Before taking on another major regulatory task, the Commission should consider the impact such action will have on its ability to devote sufficient resources to its current responsibilities.

As CompTel recommended in its initial comments, clarification and enforcement of Section 251(c) provide a better alternative to promote competition in advanced services markets.

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[45] Ad Hoc Telecommunications Users Committee Comments at 13-15.

The key to any rapid and widespread deployment of advanced services is access to the ILEC networks – as they exist today and as they evolve. It is not true, as GTE argues, that ILECs lack bottleneck control over essential inputs to advanced services.[46] Advanced services do not exist in a vacuum wholly separate from the existing network. Rather, advanced services, such as xDSL, are designed to work with and improve existing network infrastructure to provide faster connections for the transmission of ever increasing amounts of information. In this evolutionary process, ILECs do *not* start from scratch, but benefit from numerous significant advantages stemming from their existing position as incumbents. It is for this reason that the Commission (correctly) concluded in the *Memorandum Opinion and Order* that Section 251(c) applies in the advanced services context. The pace of deployment of advanced services will be promoted by allowing that decision to have its effect.

Ironically, the ILEC comments support the wisdom of this approach. U S West, for example, contends that ILECs are "uniquely well positioned" to provide advanced services "because their networks reach into virtually all communities" and because this extensive network "will permit economies of scope in the rollout of packet-switched technologies."[47] In an indictment of ILEC barriers to entry, U S West argues that placing ILECs at parity with CLECs "would saddle incumbent LECs' data affiliates with the same array of economic disincentives to serve less well-off communities that new entrants face."[48] It even admits (in a remarkable display of candor) that "having to pay" U S West's inflated loop prices "has deterred CLECs

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46 GTE Comments at 2-6.

47 U S West Comments at 16-17.

48 *Id.* at 17.

from deploying services in smaller and more rural communities."[49] Only by exploiting the "integrative efficiencies" of the ILEC network, U S West states, is widespread deployment possible. Statements such as these underscore that the real issue is not how to "free" the ILECs to compete, but how to eliminate barriers preventing CLECs from having the opportunity to compete.

CompTel submits that Section 251(c) was added precisely to address situations such as these. If the only way to tap into the mass market for advanced services is to enjoy the economies of the ILECs' existing networks, it contradicts public policy to reserve that access only for the ILEC. Expanding access to these capabilities – as Section 251(c) does – is designed to make the provision of service feasible for all carriers, so that the forces of competition can be used to increase the deployment of services. The ILECs would have the Commission set competitive policy back at least 30 years, to a model in which only the ILECs are capable (or worthy) of providing advanced services.

VI. SECTION 251(C) SHOULD BE BROADLY APPLIED, NOT NARROWED

A. The FCC Should Adopt the Reading of the Term "Successor or Assign" that Best Promotes the Goals of Section 251

At the heart of the FCC's separate affiliate proposal is the scope of the ILEC requirements in Section 251(c). Under Section 251(h)(1)(B)(ii), an ILEC affiliate must comply fully with Section 251(c) if it qualifies in any respect as an ILEC's "successor or assign."[50] Not surprisingly, the ILECs and CLECs proffer widely divergent interpretations of that term. The ILECs ask the FCC to construe those terms narrowly so that their affiliates are not ILECs unless

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[49] *Id.* at 27 n.33.

they completely replace their ILEC parents.[51] The CLECs ask the FCC to construe those terms broadly according to the natural meaning of the term "successor or assign" so that CLECs can enter the market segment for advanced services through the market-opening mechanisms established by Congress in Section 251(c).[52]

The FCC should adopt the CLECs' proposed construction of the term "successor or assign" because it best comports with Congress' goals in adopting Sections 251(c) and 706. The ILECs proffer a narrow interpretation of the term "successor or assign" so that they can remove advanced services and the critical underlying infrastructure from the ambit of Section 251(c). That interpretation would stifle competitive entry by CLECs into the market for advanced communications services, thereby preventing CLECs from using the market-opening mechanisms placed by Congress in Section 251(c) and inhibiting competition and growth in the advanced services sector contrary to Section 706. By contrast, a broad interpretation of the term "successor or assign" would maximize entry into this important market segment and promote the competitive provision of advanced services to all U.S. consumers. The compelling public interest in open entry and local competition mandates a broad interpretation of Section 251(h)(1)(B)(ii) to minimize the ability of the ILECs to defeat Congress' pro-competition objectives through the use of local services affiliates.

The CLECs' proposed interpretation also is consistent with the FCC's recent decision that certain teaming arrangements violate the prohibition in Section 271 against the Bell

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(...continued)

50 47 U.S.C. § 251(h)(1)(B)(ii).

51 *See, e.g.,* Ameritech Comments at 49-53; Bell Atlantic Comments at 26.

52 *See, e.g.,* AT&T Comments at 6; CompTel Comments at 10-11.

Companies' provision of in-region interLATA services until they satisfy a rigorous series of market-opening standards and obtain approval from the FCC.[53] As with the term "successor or assign," the BOCs offered a narrow interpretation of Section 271's critical term "provide" while the CLECs offered a broad interpretation of that term. The FCC resolved that dispute by "interpret[ing] the term 'provide' in sections 271(a) and (b) in view of the goals Congress sought to achieve by enacting these provisions."[54] The FCC rejected the BOCs' narrow construction because it would water down their incentive to open their local markets to competitive entry in compliance with Section 251(c) in order to gain entry into the long distance market under Section 271.[55] Instead, the FCC adopted the CLECs' broader interpretation of the term "provide" to ensure that the Bell Companies could not obtain "competitive advantages" from teaming arrangements.[56] For similar reasons, the FCC should adopt a broad reading of the term "successor or assign" to ensure that affiliates do not obtain any competitive advantages from their ILEC parents, thereby ensuring that the ILECs cannot defeat the market-opening provisions in Section 251(c) by removing advanced services and the underlying infrastructure to affiliates.

The ILECs' arguments that the FCC is required to adopt a narrow interpretation of the term "successor or assign" are contrived and misleading. It is well-settled that the words "successor" and "assign" take their meaning from the particular legal context in which they are

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53 *AT&T Corp. v. Ameritech Corp., et al.*, File Nos. E-98-41/42/43, FCC 98-242, rel. Sept. 28, 1998.

54 *Id.* at ¶ 30.

55 *Id.* at ¶¶ 35-37.

56 *Id.* at ¶ 37.

used.[57] The cases that Bell Atlantic cites (or, more accurately, miscites) are inapposite.[58] There are no cases which stand for the proposition that an ILEC must effectively go out of business before its affiliate could qualify as a "successor or assign." The cases cited by Bell Atlantic[59] addressed the question of when one corporation is liable for the torts or contractual obligations of another.[60] Those cases have no relevance to the issue of whether and under what conditions an affiliate should be subject to the statutory requirements imposed by Congress upon its ILEC parent.

B. "Back Door" Forbearance Proposals are Unlawful

In the *Memorandum Opinion and Order* portion of the *NPRM*, the Commission rejected the proposition that it could forbear at this time from applying Section 251(c) to advanced services.[61] As the Commission noted, the Act does not give the Commission such authority until it determines that Section 251(c) has been fully implemented, and even then only upon

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57 *See Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 264 (1974) ("no single definition" of the term "successor"); *Oregon Ry. & Navigation Co. v. Oregonian Ry. Co.*, 9 S. Ct. 409, 415 (1889) ("assign" is a "very loose and indefinite term").

58 *See* Bell Atlantic Comments at 26.

59 Bell Atlantic also cited *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 558 (2d Cir. 1976), which involves the assignment of a specific piece of property. The Court in that case did not require the assignor to go out of business to perfect the assignment of the property in question (time deposit bank accounts) to a third party. Bell Atlantic Comments at 26.

60 Bell Atlantic Comments at 26-27 (citing *Neagos and Neagos v. Valmet-Appleton*, 791 F. Supp. 682, 689 (E.D. Mich. 1992); and *Unifirst Corp.* v. Ford, 1993 Ohio App. LEXIS 143 (1993). Contrary to Bell Atlantic's implication, the *Neagos* Court never even discussed the meaning of the terms "successor" or "assign." The language quoted by Bell Atlantic was taken out of context from a discussion of product liability law in Michigan.

61 *NPRM* at ¶ 77.

satisfaction of the statutory criteria for forbearance.[62]

It is becoming increasingly apparent, however, that the separate affiliate proposal amounts to nothing more than forbearance dressed up in new clothes. The ILEC comments make clear that, other than the possible avoidance of Section 251(c), there is no benefit to them to using a separate affiliate for advanced services. Indeed, Bell Atlantic candidly admits that a separate affiliate "makes no business sense."[63] Thus, the only purpose for which a separate affiliate would be used by the ILECs is to avoid the obligations of Section 251(c). The Commission's participation in the adoption and enforcement of rules whose sole purpose is to shield advanced services from Section 251 is itself tantamount to forbearing from applying Section 251 in the first place. Whether an ILEC avoids Section 251(c) by shifting resources to an entity created outside the rule or whether the FCC excuses the ILECs from compliance for certain services, the result is the same. In each case, competitors do not have the rights granted to them by Section 251(c) over the facilities and services in question. Therefore, absent a demonstrable public policy purpose *other than* avoiding Section 251(c), the adoption of separate affiliate rules would be equivalent to the impermissible exercise of forbearance prior to the statute's full implementation.

In addition, the Commission should reject other transparent attempts to create "back-door" forbearance from Section 251(c). For example, the Commission should summarily reject SBC's suggestion that it may forbear from applying the definitions of Section 251(h).[64] Putting aside the metaphysical question of whether it is even possible to forbear from a definition rather

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62 *Id.*

63 Bell Atlantic Comments at 29-30.

than a rule, only the Cheshire Cat could believe that the prohibition on forbearance from Section 251(c) could be avoided by stripping that Section's terms of their meaning. Similarly, some ILECs are attempting to revisit the "necessary" and "impairment" standards of Section 251(c)(3). These attempts to rewrite the standards are intended to deny access to advanced services UNEs. In other words, these are attempts to forbear from the Commission's interpretation as applied to advanced services.[65]

(...continued)

[64] SBC Comments at 7.

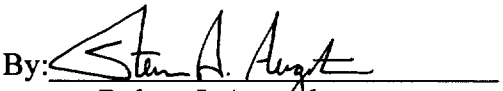
[65] *See, e.g.,* Bell Atlantic Comments at 19-20.

CONCLUSION

For the foregoing reasons, CompTel reiterates that the advanced services affiliate approach is fraught with danger, and the Commission should focus instead on ensuring that Section 251(c) is fully implemented. In order to promote Section 251(c)'s goals, the Commission should define two additional UNEs designed to ensure that a CLEC has the ability to transport packet-switched traffic to its point of interconnection with its own data network. Finally, CompTel urges the Commission to use its statutory authority to adopt the suggestions in *Uncaging Competition*. The Commission should adopt further national collocation requirements, including a cageless collocation option, and eliminate any restrictions on the type of equipment that can be collocated.

Respectfully submitted,

THE COMPETITIVE
TELECOMMUNICATIONS
ASSOCIATION

By: 

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October 16, 1998

CERTIFICATE OF SERVICES

I, Marlene Borack, hereby certify that on this 16th day of October, 1998, I caused true and correct copies of the foregoing **REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION** to be served via hand delivery upon those persons listed below.

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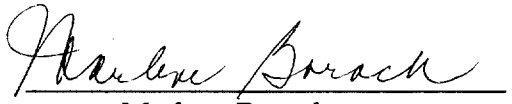

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